130-335

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~258.~~ 23

THE UNITED STATES, APPELLANT,

vs.

OSCAR J. AVERILL, MONROE SALISBURY, AARON KEYSER, AND GEORGE F. PRESCOTT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED JULY 28, 1885.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1887.

## No. 258.

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THE UNITED STATES, APPELLANT,

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OSCAR J. AVERILL, MONROE SALISBURY, AARON KEYSEY, AND GEORGE F. PRESCOTT.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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a Supreme court, Territory of Utah.

THE UNITED STATES OF AMERICA, APPELLANT,
*vs.*
OSCAR J. AVERILL, MONROE SALISBURY, AARON KEYSER, and GEORGE F. PRESCOTT, respondents.

*Transcript on appeal.*

Filed this day of , 1885.

C. S. VARIAN,
*Asst. Dist. Attorney, for Appellant.*

SHEEKS & RAWLINS,
*Attorneys for Respondents.*

1 In the district court of the third judicial district, Territory of Utah, in and for the county of Salt Lake.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
OSCAR J. AVERILL, MONROE SALISBURY, AARON KEYSER, and GEORGE F. PRESCOTT, defendants.

Now comes the United States of America and by C. S. Varian, its assistant district attorney for the Territory of Utah, complains of the defendants above named, for that heretofore, to wit, on or about the fifth day of August, A. D. 1879, the defendant, Oscar J. Averill, was duly appointed clerk of the third judicial district court of the Territory of Utah, by the presiding judge thereof, and thereafter, to wit, on the sixth day of August, A. D. 1876, the said defendants, as principal, and the above named Monroe Salisbury, Aaron Keyser, and George F. Prescott, as sureties, by their writing obligatory, duly signed, sealed, and delivered, acknowledged themselves, their heirs, executors, and administrators
2 to be jointly and severally held and firmly bound to the said United States of America in the full sum of ten thousand dollars, lawful money of the said United States, which said writing obligatory was and is subject to certain conditions therein written, whereby, among other things, it was conditioned, if the said Oscar J. Averill as clerk of said court as aforesaid, should faithfully discharge, by himself and his deputies, the duties of his said office, and properly account for all moneys coming into his hands as required by law, then that said obligation should be void, otherwise of force, as by the said writing obligatory and the conditions thereof fully and at large appears.

And the said United States of America is informed and believes that all the matters hereinafter stated are true, and upon such information and belief complains of defendants herein for that, between the said fifth day of August, A. D. 1879, and the thirty-first day of December, A. D. 1879, inclusive, the said Oscar J. Averill, while clerk as aforesaid, and as such, earned, collected, and received from different sources, as fees and emoluments of his said office, three thousand four hundred and four and 56-100 dollars, of which sum he was entitled to retain as his personal compensation the sum of one thousand six hundred and four and 16-100 dollars,

and the further sum of one thousand two hundred and fifty-four and 15-100 dollars, as the reasonable and necessary expenses of his said office, aggregating in the sum of two thousand eight hundred and fifty-eight 26-100 dollars.

That it is and was the duty of the said Averill, as clerk aforesaid, to account for and pay over to the said United States, and into the Treasury thereof, the surplus of all the fees and emoluments so earned and
3 received by him over and above the amount last stated, to wit, the sum of five hundred and forty-six 30-100 dollars, on the 31st day of January, A. D. 1880. That the said Averill utterly failed at the time aforesaid, and hitherto has neglected and failed, to account for or to pay said sum or any part thereof.

2. For a further cause of action the plaintiff complains, for that between the thirtieth day of June, A. D. 1880, and the thirty-first day of December, 1880, inclusive, the said Oscar J. Averill, while clerk as aforesaid, and as such, earned, collected, and received from different sources, as the fees and emoluments of his said office, three thousand and six and 71-100 dollars, of which sum he was entitled to retain as his personal compensation one thousand seven hundred and fifty dollars, and the further sum of one thousand one hundred and seventy-six and 15-100 dollars, as the reasonable and necessary expenses of his said office, aggregating in the sum of two thousand nine hundred and sixteen and 15-100 dollars.

That it was, and now is, the duty of said Averill, as clerk aforesaid, to account for and pay over to the said United States, and into the Treasury thereof, the surplus of all the fees and emoluments so earned and received by him over and above the amount last stated, to wit, the sum of one hundred and ninety and 56-100 dollars, on the thirth-first day of January, A. D. 1881.

That the said Averill utterly failed and neglected at the time aforesaid, and hitherto has failed and neglected to account for or pay said same sum or any part thereof.

3. For a further cause of action plaintiff complains, for that, between the thirty-first day of December, A. D. 1880, and the thirtieth day of June, A. D. 1881, inclusive, the said Oscar J. Averill, while clerk as
4 aforesaid, and as such, earned, received, and collected from different sources, as the fees and emoluments of his said office, three thousand three hundred and thirteen and thirty-six hundredths dollars, of which sum he was entitled to retain as his personal compensation one thousand seven hundred and fifty dollars, and the further sum of one thousand one hundred and forty-eight and fifteen hundredths dollars as the reasonable and necessary expenses of his said office, aggregating in the sum of two thousand eight hundred and ninety-eight and fifteen hundredths dollars. That it was and is the duty of said Averill, as said clerk aforesaid, to account for and pay over to the said United States, and into the Treasury thereof, the surplus of all the fees and emoluments so earned and received by him over and above the amount last stated, to wit, the sum of four hundred and fifteen and twenty-one hundredths dollars, on the thirty-first day of July, A. D. 1881.

That the said Averill utterly failed and neglected at the time aforesaid, and hitherto has failed and neglected, to account for or to pay said sum or any part theaeof.

4. For further cause of action plaintiff complains, for that, between the thirty-first day of December, A. D. 1881, and the thirtieth day of June, A. D. 1882, inclusive, the said Oscar J. Averill, while clerk as aforesaid, and as such, earned, collected, and received from different sources, as the fees and emoluments of his said office, three thousand four hundred and twenty-eight and fifty-six hundredths dollars, of which sum he was entitled to retain as his personal compensation one thousand seven hundred and fifty dollars, and the further sum of one thousand one hundred and four and twenty hundredths dollars as the reasonable and necessary expenses of his said office, aggregating in the sum of two thousand eight hundred and fifty-four and twenty hundreths dollars.

That it was and is the duty of said Averill, as clerk aforesaid, to account for and pay to the said United States and into the treasury thereof the surplus of all the fees and emoluments so earned and received by him over and above the amount last stated, to-wit, the sum of five hundred and seventy-four and thirty-six hundredths dollars, on the 31st day of July, A. D. 1882.

That the said Averill utterly failed and neglected at the time aforesaid, and hitherto has failed and neglected, to account for or to pay over said sum, or any part thereof.

5. For a further course of action plaintiff complains, for that, between the thirtieth day of June, A. D. 1822. and the thirty-first day of December, 1882, inclusive, the said Oscar J. Averill, while clerk as aforesaid and as such, earned, collected and received from different sources as the fees and emoluments of his said office, five thousand seven hundred and seventy-eight and 5-100 dollars, of which sum he was entitled to retain as his personal compensation one thousand seven hundred and fifty dollars, and the further sum of one thousand one hundred dollars as the reasonable and necessary expenses of his said office, aggregating in the sum of two thousand eight hundred and fifty dollars.

That it was and is the duty of said Averill, as clerk aforesaid, to account for and pay over to the said United States and into the treasury thereof the surplus of all the fees and emoluments so earned and received by him over and above the amount last stated, to-wit, the sum of two thousand nine hundred and twenty-eight and 5-100 dollars on the 31st day of January, A. D. 1883.

That the said Averill utterly failed and neglected at the time aforesaid, and hitherto has failed and neglected to account for or pay over said sum, or any part thereof.

6. For further cause of action plaintiff complains, for that, between the thirty-first day of December, A. D. 1882, and the thirtieth day of June, A. D. 1883, inclusive, the said Oscar J. Averill, while clerk as aforesaid and as such, earned, collected, and received from different sources, as fees and emoluments of his said office, three thousand one hundred and sixteen and 95-100 dollars, of which sum he was entitled to retain as his personal compensation one thousand seven hundred and fifty dollars, and the further sum of one thousand one hundred dollars as the reasonable and necessary expenses of his said office, aggregating in the sum of two thousand eight hundred and fifty dollars.

That it was and is the duty of said Averill, as clerk aforesaid, to account for and pay over to the said United States and into the treasury thereof

the surplus of all fees and emoluments so earned and received by him, over and above the amount last stated, to-wit, the sum of two hundred and sixty-six and 95-100 dollars, on the thirty-first day of July, A. D. 1883.

That the said Averill utterly failed and neglected at the time aforesaid, and hitherto has failed and neglected to account for or pay over said sum or any part thereof.

7. For further cause of action, plaintiff complains, for that, between the thirtieth day of June, A. D. 1883, and the thirty-first day of December, A. D. 1883, inclusive, the said Oscar J. Averill, while clerk as aforesaid and as such, earned, collected, and received from different sources, as the fees and emoluments of his said office, three thousand one hundred
7 and eighty-one and 90-100 dollars, of which sum he was entitled to retain as his personal compensation one thousand seven hundred and fifty dollars, and the further sum of one thousand one hundred dollars as the necessary and reasonable expenses of his said office, aggregating in the sum of two thousand eight hundred and fifty dollars.

That it was the duty of said Averill, as clerk aforesaid, to account for and pay over to the said United States and into the treasury thereof the surplus of all the fees and emoluments, so earned and received by him, over and above the amount last stated, to-wit, the sum of three hundred and thirty-one and 90-100 dollars, on the thirty-first day of January, A. D. 1884.

That the said Averill utterly failed and neglected at the time aforesaid, and hitherto has failed and neglected to account for or to pay over said sum or any part thereof.

Wherefore, the said United States demands judgment against the said defendants, and each of them, in the full sum of five thousand two hundred and fifty-three and 33-100 dollars, in lawful money of the United States of America, with interest at the rate of six per cent. per annum, and until paid on $546.30 of said sum from January 31st, 1880; on $190.56 of said sum from January 31st, 1881; on $415.21 of said sum from July 31st, 1881; on $574.36 of said sum from July 31st, 1882; on $2,928.25 of said sum from January 31st, 1883; on $266.95 of said sum from July 31st, 1883; and on $331.90 of said sum from January 31st, 1883, and for costs of suit.

C. S. VARIAN,
*Assistant District Attorney.*

8 TERRITORY OF UTAH,
*County of Salt Lake, ss:*

C. S. Varian, being first duly sworn, says that he is the assistant district attorney of the United States for the Territory of Utah; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated on his information and belief, and as to those matters he believes it to be true.

C. S. VARIAN.

Subscribed and sworn to before me this 29th day of November, 1882.

J. M. ZANE,
*Clerk Third District Court.*

(Endorsed:) Title of court and cause. Complaint. Filed November 29th, 1884. J. M. Zane, clerk. By H. G. McMillan, deputy clerk. Issued November 29, 1884.

*Title of court and cause.*

1. Now come the defendants, Aaron Keyser and Geo. F. Prescott, and demur to the first cause of action stated in complaint herein, on the ground that it does not state facts sufficient to constitute a cause of action.

2. Said defendants demur to the second cause of action on the ground that it does not state facts sufficient to constitute a cause of action.

3. And to the third cause of action, on the ground that it does not state facts sufficient to constitute a cause of action.

9 4. And to the fourth cause of action, on the ground that it does not state facts sufficient to constitute a cause of action.

5. And to the fifth cause of action, on the ground that it does not state facts sufficient to constitute a cause of action.

6. And to the sixth cause of action, on the ground that it does not state facts sufficient to constitute a cause of action.

7. And to the seventh cause of action, on the ground that it does not state facts sufficient to constitute a cause of action.

Wherefore, these defendants ask to be dismissed with costs of action.

SHEEKS & RAWLINS,
*Attorneys for Aaron Keyser and Geo. F. Prescott.*

(Endorsed:) Title of court and cause. Demurrer. Service of copy of within admitted December 9th, 1884. Dickson & Varian, plaintiff's attorneys. Filed December 9th, 1884. J. M. Zane, clerk.

THE UNITED STATES
*vs.*
O. J. AVERILL ET AL.

The demurrer to the complaint herein, now coming on to be heard, and having been argued by Assistant U. S. District Attorney C. S. Varian, for the plaintiff, and J. L. Rawlins for the defendants, is submitted and taken under advisement by the court.

February 14, 1885.

10 THE UNITED STATES
*vs.*
O. J. AVERILL ET AL.

The demurrer to the complaint herein, having been heretofore argued and submitted to the court, and the court having carefully considered the same, and being now fully advised thereon,

It is ordered that the demurrer be and is hereby sustained and that plaintiff have ten days in which to amend. To which order and ruling, plaintiff by its counsel duly excepts.

February 18, 1885.

*Title of court and cause.*

It is hereby stipulated by and between counsel for the respective parties herein, that the objection heretofore taken by counsel for defendants Aaron Keysor and Geo. F. Prescott to the complaint, that the statements relative

to the execution and delivery of the undertaking mentioned therein are not referred to or made in each count following the first is hereby waived, and the order of court heretofore made sustaining the said defendant's demurrer on said ground may be amended and made to show that such objection was and is abandoned.

C. S. VARIAN,
*Assistant U. S. Attorney.*
SHEEKS & RAWLINS,
*Attorneys for Defendants.*

FEBRUARY 21, 1885.

(Endorsed:) Stipulation. Filed February 21, 1885. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

11 THE UNITED STATES OF AMERICA
*vs.*
O. J. AVERILL ET AL.

The demurrer of defendants Keyser and Prescott having been sustained and plaintiff not having amended the complaint:

Now, on motion of Sheeks and Rawlins, attorneys for said defendants, it is ordered that judgment be entered herein adjudging that plaintiff take nothing by said suit, and dismissing the complaint and awarding to said defendants their costs on this behalf expended and taxed at the sum of $10.00.

March 20, 1885.

*Title of court and cause.*

The defendants Aaron Keyser and George F. Prescott having been served with summons in this case, and having appeared by their counsel, Messrs. Sheeks and Rawlins, and demurred to the complaint of plaintiff filed herein, and said demurrer having been heretofore argued and submitted to the court by counsel for said defendants and by Messrs. Dickson and Varian, attorneys for said plaintiff, and this court by its decision and judgment regularly made and entered and having sustained said demurrer,

Now, on motion of Messrs. Sheeks and Rawlins, attorneys for said defendants, and by reason of the premises aforesaid, it is by the court ordered, adjudged, and decreed, that plaintiff take nothing by the said suit and the complaint herein dismissed, and it is further adjudged and decreed that said defendants do have and recover from said plaintiff their costs on this behalf expended and taxed at the sum of $10.00.

12 Judgment entered March 20, 1885.

(Endorsed:) Judgment. Filed March 20, 1885. J. M. Zane, clerk' by H. G. McMillan, deputy clerk.

*Title of court and cause.*

Take notice that the plaintiff herein, the United States of America, hereby appeals to the supreme court of the Territory of Utah from the

judgment heretofore rendered in the third judicial district court in and for said territory, in favor of the above-named Aaron Keyser and Geo. F. Prescott, defendants herein, and against said plaintiff, the United States of America, and from the whole of said judgment.

C. S. VARIAN,
*Assistant U. S. Attorney.*

To the clerk of said district court, and to Messrs. Sheeks and Rawlins, attorneys for said defendants.

Dated March 26, 1885.

(Endorsed:) Title of court and cause. Notice of appeal. Filed March 26, 1885. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

Service with copy admitted this 26th day of March, 1885.

SHEEKS & RAWLINS,
*Attorneys for Defendants.*

TERRITORY OF UTAH, *County of Salt Lake, ss:*

I, John M. Zane, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and cor-
13 rect copy of the original complaint, demurrer, orders submitting demurrer and sustaining demurrer, stipulation, order for entering judgment, judgment entered, and notice of appeal in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 3d day of April, A. D. 1885.

[SEAL.] J. M. ZANE, *Clerk,*
By H. G. McMILLAN, *Deputy Clerk.*

(Endorsed:) United States vs. Oscar J. Averill et al. Transcript. Filed April 4, 1885. E. T. Sprague, clerk.

14 TUESDAY, *June 2d*, A. D. 1885.

* * * * * * *

THE UNITED STATES, APPELLANT,
*vs.*
OSCAR J. AVERILL ET AL., RESPONDENTS. } From 3d dist.

This cause coming on regularly for hearing, was argued by Mr. Varian for appellant, Mr. Rawlins for respondents. Submitted and taken under advisement.

THURSDAY, *June 18th*, A. D. 1885.

* * * * * * *

THE UNITED STATES, APPELLANT,
*vs.*
OSCAR J. AVERILL ET AL., RESPONDENTS. } From 3d dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the

same is hereby, affirmed in all respects, except as to the allowance of costs; and as to costs is hereby reversed and vacated.

15 SATURDAY, *June 20th*, A. D. 1885.

* * * * * * *

THE UNITED STATES, APPELLANT,
*vs.*
OSCAR J. AVERILL ET AL., RESPONDENTS. } From 3d district.

In this cause said appellant, by its counsel, prayed the allowance of an appeal from the judgment of this court entered the 18th day of June instant, to the Supreme Court of the United States, and counsel of respondents being present and making no objection, it is ordered that the appeal so prayed be, and is hereby, allowed.

16 In the supreme court of the Territory of Utah, June term, 1885.

THE UNITED STATES OF AMERICA, APPELLANT,
*vs.*
OSCAR J. AVERILL ET AL., RESPONDENTS.

*Opinion of the court.*

BOREMAN, Justice, delivered the opinion of the court:

This is an action brought by the United States against Oscar J. Averill and his sureties on his official bond as clerk of the third district court of this Territory, to recover certain balances of the fees and emoluments of his office in excess of the yearly limit of thirty-five hundred dollars, claimed to be fixed by the United States statutes. To the complaint a demurrer was filed to each count alleging that the same did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The objection under this demurrer, that the statements relative to the execution and delivery of the bond were not made in the various courts subsequent to the first, was waived and abandoned by defendants Keyser and Prescott, who alone were served with process and appeared.

17 The demurrer being sustained on other ground, and appellant electing to stand upon the complaint, and declining to amend the same, final judgment was entered in favor of the respondents, and thereupon appellant brought the case to this court.

The sole question in dispute is as to whether the clerk was required to account and pay over to the United States the fees and emoluments of his office in excess of $3,500.

The district courts of this Territory are territorial and not United States courts, but have United States circuit and district court jurisdiction, and chancery and common-law jurisdiction. They are dual in their nature, exercising on the one hand the powers of a United States court in the States, and on the other hand the powers common to a State court. They appoint their own clerks, there being but one clerk in each district, and such clerk attending to both United States and Territorial matters. The United States marshal for the Territory, and the United States dis-

18 trict attorney for the Territory, are appointees of the President, by

and with the advice and consent of the Senate. Whether there be any statute of the United States limiting the compensation of a United States marshal for the Territory to a maximum of $6,000, or to any other sum, or whether there be any such statute limiting the compensation of the United States district attorney for the Territory to a maximum of $9,500, or $6,000, or $3,500, are not questions now before us for consideration, and the fact that the Treasury Department may construe the law limiting the compensation allowed to such officers in the States as applicable to these officers in a Territory, although persuasive and entitled to respectful consideration, is not conclusive upon this court.

From the foundation of the Government up to the year 1853 there was no statute or law placing a limit upon the amount of the fees and emoluments of office that might be retained by or allowed to the United States marshals, United States district attorneys, and United States circuit and district court clerks, inside of the States. But in that year, 1853, Congress prescribed a limit to the amounts that these officers in the
19 States might retain or be allowed of the fees and emoluments of their respective offices. No limit was placed upon the compensation to be allowed the clerk of the United States Supreme Court for many years thereafter, namely, in 1883. (22 St. at Large, 631.) The act of Congress of 1853 limited the compensation of United States marshals and United States district attorneys in the States to $6,000 each per annum, and of clerks of the United States circuit and district courts in the States to $3,500 each per annum; but this act was not made applicable nor interpreted to apply to any United States marshal or United States district attorney in any Territory, nor to the clerk of any supreme or district court in any Territory; nor did the Treasury Department hold that it was applicable to any such officer in any Territory. The law stood thus until the 23d day of June, 1874, when Congress enacted that, "The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses,
20 commissioners, and printers in the Territories of the United States, shall be the same for similar services by such person as prescribed by chapter 16, title, 'The Judiciary,' and no other compensation shall be taxed or allowed." (U. S. Rev. St., 1878, (2d ed.) § 1883.)

This section does not purport to extend the whole of chapter 16 over the Territories. It points the officers to the chapter where the various items of service they can charge for, and the amounts they can charge, can be found, but does not refer to such chapter to find the limitation upon the amount they may retain or be allowed after the charges, fees, and costs have been collected. It says that "the fees and costs to be allowed such officers," &c., "shall be the same for similar services by such persons as prescribed by chapter 16," &c., and then it prohibits them from claiming any other compensation, saying that "no other compensation shall be taxed or allowed." From this language it might be a question whether the statute was intended to control even the fees of such persons and officers in any other than United States cases. It evidently did not look to
21 the fixing of a limit to their incomes. The U. S. Revised Statutes embracing this provision were approved on the 22d day of June, 1874, and on the following day Congress passed, and the President approved, another act entitled "An act in relation to courts and judicial of-

ficers in the territory of Utah," commonly known as the "Poland bill." By the 7th section of this latter act it is provided:

"SEC. 7. That the act of the Territorial legislature of the Territory of Utah entitled 'An act in relation to marshals and attorneys,' approved March third, eighteen hundred and fifty-two, and all laws of said Territory inconsistent with the provisions of this act, are hereby disapproved. The act of the Congress of the United States entitled 'An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes,' approved February twenty-sixth, eighteen hundred and fifty-three, is ex-
22 tended over, and shall apply to the fees of like officers in said Territory of Utah. But the district attorney shall not by fees and salary together receive more than thirty-five hundred dollars per year; and all fees or moneys received by him above said amount shall be paid into the Treasury of the United States."

These two statutes having become laws within a day of each other, and being upon the same general subject, should be construed together. The latter says that "the act of Congress entitled," &c., "is extended over and shall apply to the fees of like officers in said Territory of Utah." This portion of the latter section does, in specific terms, what the former enactment does in general terms, and the repetition in this act in regard to Utah, of the general provision, seems mainly to have been necessary in order to give full effect to the antecedent provisions, in the same section, disapproving an act of the Territorial legislature and disapproving "all laws of said Territory inconsistent with the provisions of this act," and the subsequent limitation on the income of the district attorney, it
23 being the evident aim and purpose of Congress, by this enactment, to blot out all provisions of Territorial statutes inconsistent with the United States fee bill, and to give a new fee bill, and to place a further restriction upon the amount in fees and salary to be allowed the district attorney by the Government. To say the least, there is nothing in the fact that in a part of a section in a special law there is in substance repeated what is enacted in a general law on the same day or preceeding day, that would lead us to believe that more was intended in the special than in the general law, when we can see good reason for the repetition, and no express language is used to convey the idea that more was intended. It will be noticed that the act thus by said 7th section extended over the Territory was an act "to regulate the fees and costs" and it was also an act "for other purposes," but so far as express lan-
24 guage goes, it extends the act over the Territory "only as to fees." There is nothing said about the "other purposes." To interpret or construe it as including the "other purposes" would seem to be putting an improper strain upon the language used. Where statutes are restrictive of the rights of public officers to all the fees and emoluments of their office, generally allowed by law, limiting and cutting down their compensation to a fixed maximum, are to be interpreted so as to give effect to the restriction only so far as the legislature has positively spoken. (U. S. vs. Bassett, 2 Story, 389.)

This statute certainly has not in express words said that the limitation provisions of the act of Congress of 1853 are extended over the Territory and made to apply to these officers. We have no right to place a forced

construction upon the language used. It is an equitable and just rule that where there is doubt in regard to the construction of a statute regarding the compensation of officers the construction most favorable to the
25 officer should be adopted. (U. S. vs. Morse, 3 Story, 87; Moore's case, 4 Ct. Cl., 139.) Recognizing this rule, and upon the whole case, it is evident that the action of the court below should stand, except as to the judgment for costs. Let the judgment be modified by striking out the allowance of costs and affirmed in other respects.

Powers, associate justice, concurs; Zane, chief justice, took no part in the decision of this case and expresses no opinion.

Filed June 18th, 1885.

26 TERRITORY OF UTAH,
*County of Salt Lake, ss:*

I, E. T. Sprague, clerk of the supreme court of Utah Territory, in pursuance of an appeal allowed in the case of the United States vs. Oscar J. Averill and others, do return attached hereto a transcript of the record and proceedings, including the opinion in and of said court in said cause to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record, proceedings, and opinion is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I have hereunto set my hand and the seal of said supreme court of Utah Territory this 10 day of July, A. D. 1885.

[SEAL.] E. T. SPRAGUE,
*Clerk.*

(Indorsement on cover:) No. 258. The United States, appellant, vs. Oscar J. Averill, Monroe Salisbury, Aaron Keyser, and George F. Prescott. Utah Territory supreme court. Filed July 28, 1885.

# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
*vs.*
OSCAR J. AVERILL AND OTHERS. } No. 258.

**APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.**

## Brief for the United States.

WM. A. MAURY,
*Assistant Attorney-General.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
*vs.*
OSCAR J. AVERILL AND OTHERS. } No. 258.

**APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.**

## Brief for the United States.

This is an action on the official bond of Oscar J. Averill as clerk of the third judicial district court of the Territory of Utah.

The bond is in the penal sum of $10,000, and is conditioned, amongst other things, for the properly accounting by the said Averill "for all moneys coming into his hands as required by law."

The complaint (pp. 1–4) contains seven counts, each setting out as a breach of the condition of the bond that the said Averill had failed to account for certain fees and emoluments of his office.

The aggregate of the several amounts claimed is $5,253.33, with interest on each amount (p. 4).

The defendants Keyser and Prescott, upon whom only process was served, demurred to the complaint (p. 5).

The demurrer was sustained by the court, with leave to the plaintiff to amend within ten days (p. 5).

By stipulation the objection that each count after the first is defective in that it omits to aver the execution and delivery of the obligation in suit is waived, and it is agreed that the order sustaining the demurrer "may be amended and made to show that such objection was and is abandoned" (pp. 5, 6).

The plaintiff having elected to stand by its complaint a formal judgment *with costs* was entered for the defendants (p. 6).

This judgment was affirmed by the supreme court of the Territory, saving as to costs, in which particular the judgment was reversed (pp. 7, 8).

And thereupon the attorney for the United States prayed an appeal to this court, "and counsel of respondents being present and making no objection, it is ordered that the appeal so prayed be, and is hereby, allowed" (p. 8).

## ERROR ASSIGNED.

It was error in the court below to sustain the demurrer.

## ARGUMENT.

The defendant, Averill, claims that while by section 839 the clerks of the United States circuit and district courts are not allowed to retain out of the fees received by them more than $3,500 and the necessary expenses of their offices, including necessary clerk hire, the clerks of the Territorial courts, although expressly allowed to charge fees according to the tariff prescribed for the former, are exempt from the duty of accounting in any way to the United States for such fees.

This claim is made in the face of section 1883, Revised Statutes, which is as follows:

> The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers, in the Territories of the United States, shall be the same for similar services by such persons as prescribed in chapter sixteen, title "The Judiciary," and no other compensation shall be taxed or allowed.

According to the court below this section gives the clerks of the Territorial courts all the benefits without any of the burdens imposed on clerks of the United States courts by chapter 16, title "The Judiciary."

This interpretation of section 1883 would seem to be a very mistaken one When it is declared that the fees and costs to be allowed the clerks of Territorial courts shall be the same "as prescribed in chapter 16, title 'The Judiciary,'" the natural import of the language would seem to be that such clerks shall not be permitted to receive fees in any other way than on the terms and conditions of chapter 16, one of which is to account to the Treasury for all fees over $3,500 and necessary expenses.

It must be kept in mind that the object of chapter 16 is not only to provide compensation for clerks of courts and other officers therein named, but also revenue for the Treasury, and when section 1883 declares that the fees and costs of clerks of Territorial courts shall be the same "as prescribed" in chapter 16, it means in the way prescribed in that chapter, both as to revenue and compensation. This is the common signification of the particle *as*. The sentence from Lord Bacon's Apophthegms, "Parmenio said, 'Sure I would accept of these offers if I were *as* Alexander,'" is thus rendered by Mr. Richardson (*voc.* as): "Sure I would accept these offers if I were *that* or the man *that* Alexander is, or in the situation *that* Alexander is." He tells us that in rendering *as*, words must be supplied according to the context, such as "cause, means, instrument, manner, state, or condition, etc.; for the cause that, in the manner that, etc."

Hence clerks of Territorial courts are allowed fees under precisely the same regulations and conditions as clerks of United States courts, that

is to say, in the manner and form prescribed by chapter 16, title, "The Judiciary."

We doubt whether the court below would have sustained the demurrer if it had not overlooked a provision in the act of 3d March, 1855 (10 Stat., 671), entitled "An act making appropriations for the civil and diplomatic expenses of Government for the year ending the thirtieth of June, eighteen hundred and fifty-six, and for other purposes," which provision (§ 12) is as follows:

> That the provisions of the act of February twenty-sixth, eighteen [hundred] and fifty-three, "to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes," are hereby extended to the Territories of Minnesota, New Mexico, and Utah, as fully, in all particulars, as they would be, had the word "Territories" been inserted in the sixth line after the word "States," and the same had read, "in the several States and in the Territories of the United States." This clause to take effect from and after the date of said act, and the accounting officers will settle the accounts within its purview, accordingly.

It is on this provision, admitting the clerks, marshals, and attorneys of the Territories mentioned to the benefits, and subjecting them to the

burdens of the fee act of February 26, 1853, that is based section 1883, Revised Statutes, thus showing that that section has no such restricted meaning as the court below placed on it, but was intended to be in a sense the counterpart and equivalent of the provision of the twelfth section of the act of 1855 above quoted.

That the court had no idea of this partial relation of section 1883, Revised Statutes, to previous legislation is apparent by its statement that the fee act of 1853 was never extended to the Territories in any of its provisions until the Revised Statutes went into effect.

The provision in the twelfth section of the act of 3d March, 1855, putting clerks, marshals, and attorneys in the Territories of Minnesota, New Mexico, and Utah upon precisely the same footing as such officers have under the fee act of 1853, and the presumption that holds since the enactment of section 1883, Revised Statutes, that the old law governing this subject in Utah and the other Territories mentioned in the act of 1855 was intended to remain in force, with an

extension to all the Territories, as this court has so often said (*U. S.* v. *Bowen*, 100 U. S. R., 508; *Viterbo* v. *Friedlander*, 120 U. S. R., 726; *Cambria Iron Company* v. *Ashburn*, 118 U. S. R., 57), make it unnecessary to do much more than refer to the seventh section of the act 23d June, 1874, entitled "An act in relation to courts and judicial officers in the Territory of Utah, which is in these words:

> SEC. 7. That the act of the Territorial legislature of the Territory of Utah entitled "An act in relation to marshals and attorneys," approved March third, eighteen hundred and fifty-two, and all laws of said Territory inconsistent with the provisions of this act, are hereby disapproved. The act of the Congress of the United States entitled "An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes," approved February twenty-sixth, eighteen hundred and fifty-three, is extended over, and shall apply to the fees of like officers in said Territory of Utah. But the district attorney shall not by fees and salary together receive more than thirty-five hundred dollars per year; and all fees or moneys received by him above said amount shall be paid into the Treasury of the United States.

Certainly it would not be profitable to follow the court below in its discussion of the provision last quoted, it being plain, as we have said, that

the court was not acquainted with the act of March 3, 1855, which must be treated as still in force, and which completely does what the court labors to show had not been done either by the Revised Statutes or the act of June 23, 1874.

It may be remarked, however, that the primary objects of the act of 23d June, 1874, were to do away with certain laws passed by the legislature of Utah and to regulate the compensation of the district attorney for the Territory, and that what is said in that act with reference to extending the fee act of 1853 to Utah must be taken as merely a legislative interpretation of section 1883, Revised Statutes, which had only gone into effect *the day before*, or as a declaration of what was already the law.

The construction of section 1883, Revised Statutes, contended for here is, as stated in the opinion of the court below, the one adopted and acted on by the First Comptroller of the Treasury (3 Lawrence's Decisions, 119), and, it is presumed, will be followed by this court in ac-

cordance with its repeated decisions (U. S. *v.* Hill, 120 U. S. R., p. 182, and cases cited).

It is therefore respectfully submitted that the demurrer should not have been sustained, and that the judgment should be reversed.

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